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## Protecting Journalists from Politically Motivated Claims of Espionage Under International Law

Allison Brinkerhoff

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# Protecting Journalists from Politically Motivated Claims of Espionage Under International Law

by ALLISON BRINKERHOFF\*

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## I. Introduction

Journalists have been called the “watchdogs” of society,<sup>1</sup> tasked with gathering and disseminating what is going on in the world, informing the

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1. The idea of the press being the watchdog of society is over 200 years old. The press being a watchdog means that it is constantly monitoring the government and public officials to expose any corruption or excess. See Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 YALE L. & POL’Y REV. 97, 106 (2002).

public, and ensuring governments and public figures are as accountable and transparent as possible. This role is one of high honor and importance.<sup>2</sup>

The third president of the United States, Thomas Jefferson, once penned, “Our liberty depends on the freedom of the press, and that cannot be limited without being lost.”<sup>3</sup> Similarly, Francois Delattre, the French representative to the United Nations, spoke about the importance of journalists when he said, “The freedom to provide information lies at the heart of every democracy . . . every day, journalists . . . help us better understand the world and its changes.”<sup>4</sup>

Journalists face numerous risks while doing their job. According to the Committee to Protect Journalists, 298 journalists have been killed in the past five years.<sup>5</sup> In 2014 alone, 221 journalists were jailed worldwide, as well as a number of journalists who have gone missing.<sup>6</sup> There have also been many counts of physical violence, sexual violence directed at female journalists, and government harassment of journalists participating in political expression. While there are heightened risks that journalists knowingly take to do their job, the international community can better protect journalists from the dangers they often face.

Currently, there is an international movement to better protect journalists<sup>7</sup> and the international community is banding together, resolving to better implement current laws and norms that provide journalists with needed protection. For example, on May 27, 2015, the United Nations Security Council adopted Resolution 2222, which advocated for the protection of journalists around the world in times of both armed conflict and peace.<sup>8</sup> During the Security Council debate on the Resolution, Ioannis Vrailas, the Deputy Head of the European Union, urged nation states to “promote a safe environment for journalists . . . enabling them to carry out their work independently, without undo interference and without fear of

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2. See *Prosecutor v. Brdanin & Talic*, Case No. IT-99-36-T, Decision on Motion to Set Aside Confidential Subpoena to Give Evidence, ¶ 25 (Int’l Crim. Trib. for the Former Yugoslavia June 7, 2002), <http://www.icty.org/x/cases/brdanin/tdec/en/t020612.htm>.

3. Letter from Thomas Jefferson to James Currie, *reprinted in* NAT’L ARCHIVES (Jan. 28, 1786), <http://founders.archives.gov/documents/Jefferson/01-09-02-0209>.

4. U.N. SCOR, 77th Sess., 7450th mtg. at 15, U.N. Doc. S/PV.7450 (May 27, 2015), [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=s/pv.7450](http://www.un.org/en/ga/search/view_doc.asp?symbol=s/pv.7450) [hereinafter *The Rule of Law and Transitional Justice*].

5. The Committee to Protect Journalists is a nonprofit organization whose aim is to promote the freedom of press worldwide. See generally COMM. TO PROTECT JOURNALISTS, <https://www.cpj.org/killed/> (last visited Oct. 7, 2015).

6. *2014 Prison Census: 221 Journalists Jailed Worldwide*, COMM. TO PROTECT JOURNALISTS, <https://www.cpj.org/imprisoned/2014.php> (last visited Mar. 29, 2016).

7. See S.C. Res. 2222 (May 27, 2015), [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/2222\(2015\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2222(2015)).

8. *Id.*

violence or persecution.”<sup>9</sup> Further, journalist Mariane Pearl, the widow of another journalist who was killed in 2002, gave a passionate speech about the importance of journalists and cautioned that many governments are using national security issues to “clamp down on dissent and criticism.”<sup>10</sup> She pled for the Security Council to “warn States that they should not use national security as an excuse to jail, harass, or censor journalists.”<sup>11</sup>

The resolution reaffirmed many goals, obligations, and laws that the international community has created to protect journalists, but the responsibility of nation states to refrain from detaining journalists under politically motivated claims of espionage is missing from the resolution and international law.

Some nation states detain individuals on charges of espionage, particularly when there are national security risks involved. International law needs to adopt a stricter standard to deter and prevent a nation state from detaining a journalist when the claims of espionage are politically motivated. The standard needs to be stricter with respect to journalists due to their important work and the chilling effect that detaining journalists has on the rule of law.

Currently, there is no uniform international standard for the protection of journalists against politically motivated claims of espionage. This void allows governments to cloak politically motivated claims of espionage as “national security threats.” The purpose of this paper is to propose an amendment to the International Covenant on Civil and Political Rights (“ICCPR”) to remove the void, by making Article 19 of the ICCPR a non-derogated right for journalists who are reporting and participating in political expression.

Part I of this article argues that journalists need greater protection by looking at the international rule of laws mandating a nation state’s obligation of transparency. Part II explores how journalists should be able to rely on the right of freedom of speech in order to achieve the goal of transparency, and then look at how national security is used as an overbroad justification for the detention of journalists. Part III identifies and examines current international laws that may already protect journalists—those regarding espionage and journalism. Finally, Part IV proposes a change to existing international law that would impose a higher standard for states to meet before detaining a journalist on espionage charges. The article will conclude in Part V.

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9. U.N. SCOR, 77th Sess., 7450th mtg. at 6, U.N. Doc. S/PV.7450 (Resumption 1) (May 27, 2015), [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/PV.7450\(Resumption1\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.7450(Resumption1)).

10. U.N. SCOR, 77th Sess., 7450th mtg., *supra* note 4, at 6.

11. *Id.* at 8.

## II. Transparency in Journalism

Protecting journalists from politically motivated claims of espionage is not only a good idea; it is necessary to achieve true procedural and legal transparency, which is already an articulable objective of international law.<sup>12</sup> While there are many possible definitions of a “journalist” this paper will use the term to include “any correspondent, reporter, photographer, and their technical film, radio and television assistants who are ordinarily engaged in any of these activities as their principle occupation.”<sup>13</sup>

When a journalist reports or participates in political speech or political expression—defined in this paper as “speech that deals with matters of government, public officials, legislation, and so forth”<sup>14</sup>—they are providing transparency respecting governmental affairs. This transparency can predictably collide with governmental claims of espionage which, for purposes of this paper, will be defined as “the consciously deceitful collection of information, ordered by a government or organization hostile to or suspicious of those the information concerns, accomplished by humans unauthorized by the target to do the collecting.”<sup>15</sup> The reconciliation of “transparency” on the one hand, and “espionage” on the other hand could be greatly advanced with some amendments to international law in order to provide a more predictable “rule of law” on which journalists could rely.

The Report of the Secretary-General for United Nations defined the rule of law as “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.”<sup>16</sup> The United Nations further explained that the rule of law includes adherence to “principles of supremacy of law, equality

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12. See U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004), [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2004/616](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2004/616) [hereinafter *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*]

13. Isabel Düsterhöft, *The Protection of Journalists in Armed Conflicts: How Can They Be Better Safeguarded?*, 29 *UTRECHT J. INT’L & EUROPEAN L.* 4, 8 (2013). The reason to for this particular definition of a journalists is that it is well accepted.

14. Alon Harel, *Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech*, 65 *S. CAL. L. REV.* 1887, 1896 (1992). For the purposes of this paper, this will be the definition of political speech but a further discussion will occur in section 5 providing limitations to the definition. See *infra* p. 36.

15. Lt. Col. Geoffrey B. Demarest, *Espionage in International Law*, 24 *DENV. J. INT’L & POL’Y* 321, 325–26 (1996).

16. *The Rule of Law and Transitional Justice*, *supra* note 12, at 4.

before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”<sup>17</sup> The U.S. Department of Defense has explained that implementing the rule of law will need to account for cultural, economic, institution, and operational variables of the different countries.<sup>18</sup> Journalists play a large part in helping provide transparency<sup>19</sup> and the necessary protection against pretextual claims of espionage requires more than journalists can provide for themselves.

#### A. Transparency Restricting Corruption

Transparency is one way to safeguard against government corruption. The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression determined that “professionals in the field of information play a major role in the promotion and protection of freedom of opinion and expression.”<sup>20</sup> Notably, corruption is not easily understood; rather “corruption takes many forms, but always involves the abuse of entrusted power for private gain.”<sup>21</sup> Consequently, corruption in government is a serious obstacle to the rule of law.<sup>22</sup>

Governments and high-level governmental officials are typically entrusted with political power and thus, are often the perpetrators of the abuse. Governments are unlikely to disclose or report their own abuse, and as a result, journalists supply a considerable amount of the force behind the battle against corruption. Thus, when political speech is protected and the media has the freedom to participate in political speech, the resulting transparency leads to a reduction of corruption.<sup>23</sup>

Journalists take on the significant responsibility of being the watchdogs of society, therefore it is no surprise that freedom of the media is the first of six areas that the World Governance Assessment Matrix focuses on when

17. *Id.*

18. THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, CTR. FOR LAW AND MILITARY OPERATIONS, *Rule of Law Handbook: A Practitioner’s Guide for Judge Advocates*, 1 (2011).

19. See Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, ¶ 27, U.N. Doc. A/HRC/17/27 (2011) [hereinafter Report of the Special Rapporteur].

20. *Id.*

21. *What is Corruption?*, TRANSPARENCY INT’L, <https://www.transparency.org/what-is-corruption/#define> (last visited Mar. 29, 2016).

22. *Id.*

23. See Daniel Kaufmann, *Myths and Realities of Governance and Corruption*, NAT. RESOURCE GOVERNANCE INST. (Nov. 2005), <http://ssrn.com/abstract=829244>.

determining transparency.<sup>24</sup> Moreover, journalists ensuring transparency is so important that many theorists have deemed the press the “Fourth Estate” because the chief responsibility of the press is to provide a check on governments and public officials so that states do not overstep their bounds.<sup>25</sup>

There are many examples of journalists working to establish transparency in government. Because of the work of journalists, the world was informed about the Watergate Scandal, the Genocide in Rwanda, and the atrocities promulgated in Chechnya. In 1972, Carl Bernstein and Bob Woodward, two American journalists, helped ensure transparency in U.S. politics when they exposed President Nixon for breaking laws to help him win the presidential election.<sup>26</sup> Additionally, in 1994 the world largely ignored the atrocities taking place in Rwanda until journalists, including photojournalist Simon Cox, published shocking photographs and stories of the brutality toward the Tutsi people.<sup>27</sup> Comparably, Anna Politkovskaya, a Russian journalist, reported on the conflict and human rights violations happening in Chechnya.<sup>28</sup> Politkovskaya helped provide transparency of the government behavior by informing the world of abuses committed via the army, police brutality, and corruption.<sup>29</sup> As a result of Politkovskaya’s efforts to establish transparency by participating in political speech, both Russian and Chechen authorities intimidated, threatened, and detained her on several different occasions.<sup>30</sup> In these three examples, the government officials in positions of power were promulgating the offenses, and the work of journalists exposed the officials and achieved transparency.

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24. The other five categories are: participation, fairness, decency, accountability, and efficiency. Goran Hyden et al., *Governance Assessment for Local Stakeholders: What the World Governance Assessment Offers* 3 (Jan. 2008), <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/822.pdf>.

25. See Sheila Coronel, *Corruption and the Watchdog Role of the News Media*, in PUBLIC SENTINEL: NEWS MEDIA AND GOVERNANCE REFORM (Pippa Norris ed. 2009).

26. *The Watergate Story*, WASH. POST, <http://www.washingtonpost.com/wp-srv/politics/special/watergate/part1.html> (last visited Mar. 30, 2016).

27. See Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4T, Judgment, ¶ 116 (Int’l Crim. Trib. for Rwanda Sept. 2, 1998), <http://unictr.unmict.org/sites/unictr.org/files/case-documents/ict96-4/trial-judgements/en/980902.pdf>.

28. See e.g., Anna Politkovskaya, *Her Own Death, Foretold*, WASH. POST (Oct. 15, 2006), [http://www.washingtonpost.com/wp-dyn/content/article/2006/10/14/AR2006101400805.html?nav=rss\\_print/outlook](http://www.washingtonpost.com/wp-dyn/content/article/2006/10/14/AR2006101400805.html?nav=rss_print/outlook); Anna Politkovskaya, *Slain Russian Journalist’s Last Article*, N.Y. TIMES (Oct. 13, 2006), [http://www.nytimes.com/2006/10/13/world/europe/13chechnya-text.html?\\_r=0](http://www.nytimes.com/2006/10/13/world/europe/13chechnya-text.html?_r=0).

29. Anna Politkovskaya, AMNESTY INT’L, <http://www.amnestyusa.org/our-work/cases/russia-anna-politkovskaya> (last visited Mar. 30, 2016).

30. *Id.*

Journalists are not the only group of individuals who promote transparency and help adhere to the rule of law,<sup>31</sup> but they are a large part of the equation. Governments also have an obligation to adhere to the rule of law and provide transparency.<sup>32</sup> One scholar concluded that it is a government's obligation to see that "official business [is] conducted in such a way that substantive and procedural information is available to, and broadly understandable by, people and groups in society, subject to reasonable limits protecting security and privacy."<sup>33</sup> Unfortunately, while governments need to be part of the equation to effectively uphold the rule of law, their own self-interest can get in the way of transparency. Instead, journalists often provide the accountability required to maintain the international rule of law regarding transparency.

Before Anna Politkovskaya was murdered in 2006, she said, "I am exhausted. I have seen too much. I don't want to go back to Chechnya, but if I don't who will?"<sup>34</sup> The dedication that Politkovskaya displayed toward bringing attention to government corruption is not unique to her; rather it is a trait that many journalists share.<sup>35</sup> Francois Delattre described the duty that journalists carry when he said, "We can all see that the first reflex of the enemies of freedom is to gag the press, and the first defenders of democracy are the independent media."<sup>36</sup>

The dedication that journalists display for their work and the great responsibility they carry for the struggle of transparency results in the need for increased protection. The best safeguard for transparency is to have international laws in place that provide absolute protection when journalists are exercising their human right of freedom of speech.

### III. Freedom of Speech and Derogation for Purposes of Public Emergency

While transparency is part of the internationally defined rule of law that journalists work to protect, freedom of speech is the primary means by

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31. *Justice and International Law*, UNITED NATIONS, <http://www.un.org/en/sections/priorities/justice-and-international-law/> (last visited Mar. 30, 2016) ("The principle that everyone—from the individual right up to the State itself—is accountable to laws that are publicly promulgated, equally enforced and independently adjudicated.")

32. *Id.*

33. Michael Johnston, *Good Governance: Rule of Law, Transparency, and Accountability*, UNITED NATIONS PUB. ADMIN. NETWORK, <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan010193.pdf> (last visited Mar. 30, 2016).

34. U.N. SCOR, 77th Sess., 7450th mtg., *supra* note 4, at 7.

35. *Press Freedom: Too Many Attacks Go Unpunished*, TRANSPARENCY INT'L (Nov. 22, 2013), [https://www.transparency.org/news/feature/too\\_many\\_attacks\\_on\\_journalists\\_and\\_press\\_freedom\\_go\\_unpunished](https://www.transparency.org/news/feature/too_many_attacks_on_journalists_and_press_freedom_go_unpunished).

36. U.N. SCOR, 77th Sess., 7450th mtg., *supra* note 4, at 15.

which journalists accomplish this goal. Freedom of speech is a human right protected in the International Covenant on Civil and Political Rights (“ICCPR”).<sup>37</sup> The ICCPR is a human rights treaty that was adopted in 1966 and put into effect in 1976.<sup>38</sup> The treaty is significant because it is one of three documents (the other two being the Universal Declaration of Human Rights and the International Covenant on Economic Social and Cultural Rights) that comprise what is known as the International Bill of Human Rights.<sup>39</sup> The treaty provides for “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family . . . .”<sup>40</sup> In the ICCPR, Article 19 asserts that “everyone shall have the right to hold opinions without interference” and “everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information of all kinds, regardless of frontiers, either orally, in writing or print, in the form of art, or through any other media of his choice.”<sup>41</sup> The Universal Declaration of Human Rights further explains that it is impermissible for any “state group or person . . . to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”<sup>42</sup> Plainly stated, the freedom of expression is a protected human right and governments and other individuals in power should not do anything to harm or impede that right.

For the benefit of society, the freedom of speech provides a way for journalists to report, participate in, and protect the internationally defined rule of law regarding transparency. Francois Delattre explained the duty that governments have to help journalists fulfill this obligation when he said, “It is first and foremost the responsibility of Governments to protect journalists and allow them to carry out their duties independently and without hindrance.”<sup>43</sup>

While the right to freedom of speech is requisite for true transparency, there is a doctrine in international law that allows a state to briefly suspend its legal obligation to uphold these rights. The derogation doctrine permits

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37. International Covenant on Civil and Political Rights, Dec. 19, 1966, S. Treaty Doc. 95-20, 999 U.N.T.S. 171 [hereinafter “ICCPR”].

38. There are seventy-four signatories to the treaty, and the United States signed the treaty on October 5, 1977 and ratified it on June 8, 1992. *United Nations Treaty Collection*, UNITED NATIONS, [https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtdsg\\_no=iv-4&lang=en](https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtdsg_no=iv-4&lang=en) (last visited Mar. 30, 2016).

39. *FAQ: The Covenant on Civil & Political Rights (ICCPR)*, ACLU, <https://www.aclu.org/faq-covenant-civil-political-rights-iccpr> (last visited Mar. 30, 2016).

40. ICCPR, *supra* note 37, at 172.

41. *Id.* art. 19. The reason that Article 19 does not provide the adequate protection needed for journalists is that a state can derogate from it. This will be further explained and a resolution provided later in the paper.

42. G.A. Res. 217 (III)A, Universal Declaration of Human Rights, art. 30 (Dec. 12, 1948).

43. U.N. SCOR, 77th Sess., 7450th mtg., *supra* note 4, at 15.

a state to rescind some of its human rights obligations under very temporary and specific circumstances. In other words, a state does not have to “guarantee” the right that would otherwise be protected, and the state can even inhibit the general public from enjoying the right. Article 4 of the ICCPR maintains that derogation is only permissible in times of “public emergency.”<sup>44</sup> Examples of public emergencies include “. . . armed conflicts, civil and violent unrest, environmental and natural disasters, etc.”<sup>45</sup>

#### A. Current Laws Allowing a State to Derogate Human Rights

The ability of a government to suspend or ignore such obligations does not apply to all human rights. Unfortunately, the present derogation doctrine allows a government to ignore Article 19—which provides for the freedom of speech—in times of emergency.<sup>46</sup> When a state decides to derogate from the obligation detailed in Article 19 of the ICCPR, it can infringe on the right that an individual has to speak freely.

Article 4 of the ICCPR outlines when derogation is appropriate and freedom of speech is conspicuously not protected:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16, and 18 may be made under this provision.

Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other State Parties to

44. ICCPR, *supra* note 37, art. 4.

45. The rule of law in armed conflicts project looks at how international law is implemented in both international and noninternational armed conflict. It “systematically qualifies situations of armed violence in accordance with the definition of armed conflict under international humanitarian law. It also reports on, and analyses, relevant national, regional, and international case-law.” *Derogation from Human Rights Treaties in Situations of Emergency*, RULE OF LAW IN ARMED CONFLICTS PROJECT, [http://www.genevaacademy.ch/RULAC/derogation\\_from\\_shuman\\_rights\\_treaties\\_in\\_situations\\_of\\_emergency.php](http://www.genevaacademy.ch/RULAC/derogation_from_shuman_rights_treaties_in_situations_of_emergency.php) (last visited Mar. 30, 2016).

46. There are two different schools of thought to determine what a state is obligated to do with respect to derogation. One theory reasons that a government’s obligation requires them to “provide” the right being protected. The second theory holds that a government’s obligation does not require it to “provide” the right, rather it must not “infringe” on the right being protected. The majority opinion has determined that the government’s obligation regarding freedom of speech is that the government cannot “infringe” on that right.

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the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.<sup>47</sup>

Derogation does not apply to core human rights, which are given more protection and security than other rights. These core rights include the following: right to life; prohibition of torture, cruel, inhuman and degrading treatment; prohibition of medical or scientific experimentation without consent; and freedom of thought, conscience and religion.<sup>48</sup> Regardless of the situation or circumstance, no government, person, or entity can take away a nonderogable, core right.<sup>49</sup>

For a nation state to legally derogate from its obligation to enforce a right, the state must also immediately inform the other parties to the ICCPR and provide the reasons for the derogation.<sup>50</sup> These requirements protect individuals from a state that may take advantage of the doctrine of derogation and capriciously rid itself of the obligation to protect important human rights. Unfortunately, when a government declares a state of emergency, it often leads governments to participate in “actions that are incompatible with the right to freedom of expression and, in particular to a free media.”<sup>51</sup>

The General Assembly to the United Nations is concerned that during states of emergency, “many governments take aggressive action against freedom of expression in many different forms: by suspending TV news channels, blocking websites and telephone services, attacking detaining and arresting journalists covering protests and appointing government officials to monitor, and in effect censor, the content of newspapers.”<sup>52</sup> One of the consequences of a state of emergency is that governments frequently act arbitrarily, and subjectively detain and arrest individuals without the normal legal safeguards in place. When freedom of speech is not privileged and governments arbitrarily detain journalists, transparency

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47. ICCPR, *supra* note 37, art. 4.

48. *Id.* art. 6.

49. *Core Human Rights in the Two Covenants*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMM’R (Sept. 2013), <http://nhri.ohchr.org/EN/IHRS/TreatyBodies/Page%20Documents/Core%20Human%20Rights.pdf>.

50. *See* ICCPR, *supra* note 37, art. 4.

51. G.A. Res. A/HRC/7/14, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development ¶ 44 (Feb. 28, 2008).

52. *Id.*

becomes diminished. Thus, with transparency diminished, there is an increase of the likelihood of corruption.

### B. Derogation of Freedom of Speech

Reporters Without Borders, a nonprofit organization that works to protect journalists and advocate for the freedom of information, annually publishes the World Press Freedom Index (“the Index”), which analyzes and ranks countries based on their protection of the freedoms of speech and information.<sup>53</sup> To determine its rankings, the Index examines “media pluralism and independence, respect for the safety and freedom of journalists, and the legislative, institutional and infrastructural environment in which the media operate.”<sup>54</sup> According to the 2015 Index there has been a “worldwide deterioration in the freedom of information . . . . Beset by wars, the growing threat from non-state operatives, violence during demonstrations and the economic crisis, the media freedom is in retreat on all five continents.”<sup>55</sup>

The deterioration of freedom of information curbs the ability of journalists to successfully do their jobs, which leads to reduced transparency. For example, in 2013, Japan passed a Special Intelligence protection bill aimed at keeping any national security intelligence classified with harsh sentencing standards for any whistleblower or journalist who leaked any “sensitive” information.<sup>56</sup> Sensitive information includes “Japan’s maritime border disputes with China, and North Korea’s nuclear ambitions.”<sup>57</sup> Reporters Without Borders released a statement opposing the law: “By imposing heavy penalties on those who obtain classified information in a ‘grossly inappropriate’ manner and then publish it, parliament is making investigative journalism illegal, and is trampling on the fundamental principles of the confidentiality of journalists’ sources and ‘public interest.’”<sup>58</sup> Japan’s relationships and the events transpiring with

53. The organization lists five objectives in their mission statement: 1) is to continuously monitor attacks on freedom of information worldwide, 2) to denounce any such attacks on the media, 3) to act in cooperation with governments to find censorship and laws aimed at restricting freedom of information, 4) to morally and financially assist persecuted journalists, as well as their families, and 5) to offer material assistance to war correspondents in order to enhance their safety. *World Press Freedom Index 2015: Decline on All Fronts*, REPORTERS WITHOUT BORDERS, <https://index.rsf.org/#!/presentation> (last visited Mar. 30, 2016).

54. *Id.*

55. *Id.*

56. Yoshihide Suga, Chief Cabinet Secretary, Press Conference (Nov. 7, 2013) (transcript available at [http://japan.kantei.go.jp/tyoukanpress/201311/07\\_a.html](http://japan.kantei.go.jp/tyoukanpress/201311/07_a.html)).

57. *Prime Minister Shinzo Abe Urged to Abandon State Secrecy Bill*, REPORTERS WITHOUT BORDERS (Nov. 27, 2013), <http://en.rsf.org/japan-prime-minister-shinzo-abe-urged-to-27-11-2013,45515.html>.

58. *Id.*

both China and North Korea are important to the people of Japan and affect Japanese safety. Penalizing journalists for reporting and sharing information labeled “sensitive” severely limits journalists to effectively do their jobs.

### C. Protection of Freedom of Speech

Some countries are doing a respectable job upholding a journalist’s right to freedom of speech. For the fourth year in a row, Finland is number one on the Index.<sup>59</sup> In Finland it is “extremely rare for journalists to receive jail terms for what they write and there is a great deal of media pluralism.”<sup>60</sup> Thus, Finland is successful because the government does not arbitrarily detain journalists, and allows journalists to share opinions and ideas that diverge from the government. Journalists in Finland are entitled to freedom of speech and therefore they are able to ensure transparency.

When looking at a journalist’s role in upholding the rule of law, it is freedom of speech that allows them to help transparency come to fruition, but there are also examples of journalists publishing sensitive information that have led to negative consequences. For example, during the War on Terror, President Bush alleged that Osama bin Laden remained hidden by discarding his phone and changing his tactics and methods because the media reported about the use of his satellite phone.<sup>61</sup> Additionally, a former Russian Military officer once penned, “I was amazed—and Moscow was very appreciative—at how many times I found very sensitive information in American newspapers. In my view, Americans tend to care more about scooping their competition than about national security, which made my job easier.”<sup>62</sup>

While there are times when journalists publish sensitive information that has unintended and potentially negative consequences, the press still needs to be given the benefit of the doubt due to the pertinent role they play in society. In a landmark case from the U.S. Supreme Court, Justice Black explained the importance of the freedom of the press when he wrote,

The press was to serve the governed, not the governors. The Government’s power to censor the press was abolished so that the press would remain forever free to censure the Government. The

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59. *World Press Freedom Index 2015: Decline on All Fronts*, REPORTERS WITHOUT BORDERS, *supra* note 53.

60. *Reporters Without Borders Press Freedom Index 2014 (Latest) No. 1 Finland, America No. 46th*, LIVELEAK (June 17, 2015), [http://www.liveleak.com/view?i=4c7\\_1434564407](http://www.liveleak.com/view?i=4c7_1434564407).

61. Rachel Smolkin, *Judgment Calls*, AM. JOURNALISM REV. (2006), <http://ajrarchive.org/Article.asp?id=4185>.

62. STANISLAV LUNEV, *THROUGH THE EYES OF THE ENEMY* 135 (1998).

press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.<sup>63</sup>

If greater restrictions are put on the press as a result of bad judgment calls by a few editors and journalists who publish sensitive information, journalists will be unable to fulfill their “watchdog” role in society. Additionally, greater restrictions on the freedom of speech will likely lead to an increased number of politically-motivated claims of espionage.

#### **D. Politically-Motivated Claims of Espionage Under the Guise of National Security**

One of the more serious ways that a nation state censors journalistic freedom of speech is detaining journalists on politically motivated claims of espionage. Suppression of freedom of speech by arbitrarily threatening or detaining journalists on these claims creates a chilling effect on the media and the rule of law regarding transparency cannot be realized. As the following examples highlight, it is an unfortunate reality that as a result of providing transparency, journalists are often the first who are detained on these types of politically motivated claims.<sup>64</sup>

In August 2015, Cameroon freelance journalist Simon Ateba was detained on espionage charges after investigating the conditions of a Nigerian refugee camp.<sup>65</sup> The President of the Cameroon Journalist Trade Union, Dennis Nkwebo, condemned the arrest and acknowledged that “journalists suffer repression in the hands of military authorities” and that it was not uncommon for journalists in that area to be hauled into tribunals for possessing information without informing the government.<sup>66</sup>

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63. *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971).

64. Suppressing the media with “national security” claims does not always result in espionage charges. Alternatively, journalists are detained but not charged, or there are instances where government suspends the Internet and cell phones. For example, dozens of reporters have been detained, but not charge with espionage, in Turkey because of the reporting they have done regarding the current conflict with the Kurdish people. Additionally, in India it has been reported that “mobile Internet and communications are suspended in response to any unrest.” *Biggest Rises and Falls in the 2014 World Press Freedom Index*, REPORTERS WITHOUT BORDERS (Dec. 16, 2014), <http://www.mfwa.org/biggest-rises-and-falls-in-the-2014-world-press-freedom-index/>.

65. *Journalist Detained for Four Days in Cameroon, Accused of Espionage*, COMM. TO PROTECT JOURNALISTS, (Sept. 2, 2015, 10:18AM), <https://cpj.org/2015/09/journalist-detained-for-four-days-in-cameroon-accu.php>.

66. *Cameroonian Journalists Union, CPJ, Others Condemn Arrest of Nigerian-Based Journalist*, PREMIUM TIMES (Aug. 30, 2015), <http://www.premiumtimesng.com/news/top-news/189233-cameroonian-journalists-union-cpj-others-condemn-arrest-of-nigerian-based-journalist.html>.

Similarly, on July 22, 2014, Jason Rezaian, a *Washington Post* journalist, was arrested in Iran and charged with espionage.<sup>67</sup> Rezaian, a dual citizen of the United States and Iran, was stationed in Iran as the bureau chief for the *Washington Post* and regularly wrote about the government and overall situation in Iran.<sup>68</sup> After detaining him for almost 15 months, the government of Iran found Rezaian guilty.<sup>69</sup> The trial was held in secret and Iran has been unwilling to share any of the evidence that led to his arrest, detention, and ultimate conviction.<sup>70</sup> John Hughes, the president of the National Press Club, issued the following statement after news of Rezaian's conviction:

Now it is time for the community of nations to step forward as one and demand the release of Jason Rezaian from prison in Iran. This has been a sham trial from the beginning. The process was closed to the press. There were no witnesses. There was no evidence. Jason is guilty of nothing. He was taken from his home without charges and held without charges for months. This is absurd. No nation should be allowed to behave in this manner. These sham trials must stop.<sup>71</sup>

The detentions of both Rezaian and Ateba exemplify the types of politically-motivated situations from which journalists need protection.<sup>72</sup> Notably, a journalist need not be formally charged with espionage for a chilling effect to take place; a government need only invade a journalist's privacy during an investigation for the chilling effect to occur.

In 2013, it was discovered that the U.S. Department of Justice ("DOJ") was investigating Fox News reporter James Rosen under suspicion that he

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67. Aresu Egbali, *Washington Post Reporter Jason Rezaian Sentenced to Prison in Iran*, WALL ST. J. (Nov. 22, 2015, 9:37 AM), <http://www.wsj.com/articles/washington-post-reporter-jason-rezaian-sentenced-to-prison-in-iran-1448198251>.

68. *Id.*

69. Editorial Board, *Iran's Cruel and Arbitrary Treatment of the Post's Jason Rezaian*, WASH. POST (Nov. 23, 2015), [https://www.washingtonpost.com/opinions/irans-cruel-and-arbitrary-treatment-of-the-posts-jason-rezaian/2015/11/23/452af84c-9213-11e5-a2d6-f57908580b1f\\_story.html](https://www.washingtonpost.com/opinions/irans-cruel-and-arbitrary-treatment-of-the-posts-jason-rezaian/2015/11/23/452af84c-9213-11e5-a2d6-f57908580b1f_story.html).

70. Egbali, *supra* note 67.

71. *National Press Club Statement on Jason Rezaian Trial*, THE NAT'L PRESS CLUB (Oct. 12, 2015), <http://www.press.org/news-multimedia/news/national-press-club-statement-jason-rezaian-trial>.

72. Jason Rezaian, and other American detainees, were released in January 2016. They were "set free in exchange for U.S. clemency offered to seven Iranians charged or imprisoned for sanctions violations and the dismissal of outstanding charges against 14 Iranians outside the United States." Carol Morello et al., *Plane Leaves Iran with Post Reporter, Other Americans in Swap*, WASH. POST (Jan. 17, 2016), [https://www.washingtonpost.com/world/iran-releases-post-co-respondent-jason-rezaian-iranian-reports-say/2016/01/16/e8ee7858-ba38-11e5-829c-26ffb874a18d\\_story.html?hpid=hp\\_hp-banner-high\\_rezaian-1030am%3Ahomepage%2Fstory](https://www.washingtonpost.com/world/iran-releases-post-co-respondent-jason-rezaian-iranian-reports-say/2016/01/16/e8ee7858-ba38-11e5-829c-26ffb874a18d_story.html?hpid=hp_hp-banner-high_rezaian-1030am%3Ahomepage%2Fstory).

was a possible co-conspirator regarding leaked classified information.<sup>73</sup> The *Washington Post* reported that the Obama Administration “pursued more leak investigations under the 1917 Espionage Act than all previous administrations combined” and that the investigators “pulled Rosen’s security badge records, phone logs and his personal emails.”<sup>74</sup> While the DOJ brought no official charges, the incident created a stage for a discussion about the chilling effects of criminalizing the practices of journalists. Seasoned journalist Brit Hume responded to the DOJ’s investigation by saying that they had crossed a “clear bright line” when seizing Rosen’s records.<sup>75</sup> The White House’s response to the investigation was that reporters needed to be able to pursue investigative journalism, but they “had to be mindful of the need to protect classified information because of our national security interests.”<sup>76</sup> When governments detain or threaten journalists on espionage claims, they often do so under the guise of “national security.”

To understand national security, it is helpful to recognize when national security claims can or cannot be invoked. The Siracusa Principles provide guidance on the limitation and derogation provisions in the ICCPR:

1. National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.
2. National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.
3. National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse.
4. The systematic violation of human rights undermines true national security and may jeopardize international peace and security. A state responsible for such violation shall not invoke national security as a justification for measures aimed at

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73. *Justice Department’s Scrutiny of Fox News Reporter James Rosen in Leak Case Draws Fire*, WASH. POST (May 20, 2013), [https://www.washingtonpost.com/local/justice-departments-scrutiny-of-fox-news-reporter-james-rosen-in-leak-case-draws-fire/2013/05/20/c6289eba-c162-11e2-8bd8-2788030e6b44\\_story.html](https://www.washingtonpost.com/local/justice-departments-scrutiny-of-fox-news-reporter-james-rosen-in-leak-case-draws-fire/2013/05/20/c6289eba-c162-11e2-8bd8-2788030e6b44_story.html).

74. *Id.*

75. *Id.*

76. *Id.*

suppressing opposition to such violation or at perpetrating repressive practices against its population.<sup>77</sup>

The main concern regarding national security arguments with respect to protection of freedom of speech is the likelihood that a state will abuse the notion of what constitutes a national security issue.

Consequently, governments may make false claims regarding national security to justify suppression of political speech and detain those providing undesired overview and transparency. The Parliamentary Assembly of the Council of Europe explained, through an analogous situation, that states can use “national security” to justify undesirable behavior when they explained that “large-scale intrusions of privacy in the name of national security are technically feasible and frequent today, and it can be assumed that other countries with a weaker democratic practice are using the same technologies for privacy intrusions, in particular against political opponents.”<sup>78</sup> This example, while not addressing the use of national security claims to detain journalists, shows that governments are willing to justify unpopular or illegal actions by claiming that there is risk to national security. In response to detention of journalists, David Kaye, the United Nations’ special investigator on freedom of speech as well as a professor of law at the University of California, Irvine has said, “We’re seeing this more and more, this abuse of national security as an excuse to rein in bad news.”<sup>79</sup>

Reporters Without Borders illuminated the practice of governments using national security claims to suppress journalists when they explained that “[c]ountries that pride themselves on being democracies and respecting the rule of law have not set an example, far from it. Freedom of information is too often sacrificed to an overly broad and abusive interpretation of national security needs, marketing a disturbing retreat from democratic practices.”<sup>80</sup> National security claims often come in times of peace, but nation states, including those which “pride themselves on

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77. U.N., Econ. & Soc. Council, *Siracusa Principles on the Limitations and Derogation Provisions in the Int’l Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex (1985). They include relevant definitions and analysis on the concepts of both limitation and derogation. *Id.*

78. Eur. Parl. Ass., *Nat’l Security and Access to Info. Comm. Op.*, Doc. No. 13315 (2013).

79. Frank Jordans, *National Security Cited in Crackdown on Journalism Worldwide*, ASSOC. PRESS (Sept. 8, 2015, 9:04 AM), <http://bigstory.ap.org/article/fc79b8f9d7c84accb0597bef08418454/journalists-face-threat-terror-charges-reporting>.

80. *Biggest Rises and Falls in the 2014 World Press Freedom Index*, REPORTERS WITHOUT BORDERS, *supra* note 64.

being democracies” can also suppress journalists in times of war with false and overbroad claims of espionage.<sup>81</sup>

In June 2015, the Office of General Counsel for the Department of Defense released a manual detailing the United State’s interpretation on the law of war.<sup>82</sup> The Department of Defense explained:

Reporting on military operations can be very similar to collecting intelligence or even spying. A journalist may be subject to security measures and punished if captured. To avoid being mistaken for spies, journalists should act openly and with the permission of relevant authorities. Presenting identification documents, such as the identification card issued to authorized war correspondents or other appropriate identification, may help journalists avoid being mistaken as spies.<sup>83</sup>

The manual goes on to say that governments “may need to censor journalists’ works or take other security measures so that journalists do not reveal sensitive information to the enemy.”<sup>84</sup>

Soon after the manual’s release, several institutions objected to and criticized the manual for the possible restrictions placed on the freedom of the press. The *New York Times* Editorial Board argued:

Allowing this document to stand as guidance for commanders, government lawyers and officials of other nations would do severe damage to press freedoms. Authoritarian leaders around the world could point to it to show that their despotic treatment of journalists—including Americans—is broadly in line with the standards set by the United States Government.<sup>85</sup>

Further, *The Jerusalem Post* explained that some of the criticism surrounding the manual stemmed from the fact that “[f]or better or worse, sometimes journalists get their best scoops by saying they are someone they are not or by claiming to have an approval to enter a restricted area despite lacking the said approval. In the vast majority of these situations,

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81. *Id.*

82. *Law of War Manual*, DEP’T OF DEF. (June 12, 2015), <http://www.defense.gov/Portals/1/Documents/pubs/Law-of-War-Manual-June-2015.pdf>.

83. *Id.* at 174.

84. *Id.*

85. Editorial Board, *The Pentagon’s Dangerous Views on the Wartime Press*, N.Y. TIMES (Aug. 10, 2015), [http://www.nytimes.com/2015/08/10/opinion/the-pentagons-dangerous-views-on-the-wartime-press.html?\\_r=0](http://www.nytimes.com/2015/08/10/opinion/the-pentagons-dangerous-views-on-the-wartime-press.html?_r=0).

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there is no nefarious purpose and often even genuine commitment to the public interest to reveal important truths or even blow the whistle on an injustice.”<sup>86</sup>

Although the manual is not the law, but rather an explanation of the law, it still has the ability to determine how the Department of Defense—their lawyers, military, and civilian personnel, etc.—should react to journalists doing their job in times of war. The manual also sets a precedent for the world as to how journalists should be treated and what rights they are afforded. The backlash on the Department of Defense was aimed at the suppression of the freedom of the press, the possible implications that the manual could have on the right of a free media to ensure transparency, and the possible arbitrary and overreaching espionage claims against journalists.<sup>87</sup>

Journalists need protection both during times of peace and times of war. Accordingly, the international community needs to create a standard that would serve as a protection for journalists from politically motivated claims of espionage irrespective of whether times of war or peace prevail.

#### **IV. Espionage, Journalism, and International Law**

When looking to safeguard journalists from politically motivated claims of espionage, there are two areas of international law that potentially already provide such protection: international laws regarding espionage and international laws regarding journalism.

##### **A. International Laws Regarding Espionage**

Espionage can be a difficult topic to understand in the international context because there is very little international law to help define the circumstances and implications of a State participating in the activity. Professor A. John Radsan clarified the lack of law on this subject:

Espionage and international law start from different points . . . espionage dates from the beginning of history, while international law, as embodied in customs, conventions, or treaties, is a more recent phenomenon . . . they are also based on contradictory

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86. Yonah Jeremy Bob, *Rule of Law: The Architect*, THE JERUSALEM POST (Nov. 21, 2015, 9:06 AM), <http://www.jpost.com/Arab-Israeli-Conflict/Rule-of-Law-The-Architect-434729>.

87. According to the Jerusalem Post, Charles Allen, a U.S. Department of Defense official, is on record for saying that he stands by the law put forward in the manual but that the “wording of the manual could have been clearer to void controversy” specifically regarding journalists in time of war and that “he expects that there will be rewording of the manual on the journalists section in the manual’s first updates.” *Id.*

principles. The core of espionage is treachery and deceit. The core of international law is decency and common humanity.<sup>88</sup>

The only definite international law regarding espionage is found in circumstances where the laws of war apply. Article 46 of Protocol I<sup>89</sup> explains that if a member of a military is captured in uniform on enemy ground as a “scout,” she should be given the protection of a prisoner of war, but if that same member is captured without her military uniform and is acting under false pretenses, she will be considered a spy and not given the protections of a prisoner of war.<sup>90</sup> Article 46 also provides that if a spy returns to her own territory and then is later captured, she will be given the protections afforded to a prisoner of war.<sup>91</sup> Thus, as the only law directly addressing espionage, Article 46 provides no understanding of the legal

88. A. John Radsan, *The Unresolved Equation of Espionage and International Law*, 28 MICH. J. INT’L L. 596, 623 (2007).

89. Protocol I is a set of international laws that are additional to the Geneva Conventions and are for the protection of Victims of International armed conflicts. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter “Protocol I”]. Protocol I is to be used in armed conflict between people who are “fighting against colonial domination and alien occupations and against racist regimes in the exercise of their right of self-determination . . . .” *Id.* Preamble, art. 1.

90. *Id.* art. 46. Article 46 states:

1. Notwithstanding any other provision of the Conventions or of this Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.

2. A member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.

3. A member of the armed forces of a Party to the conflict who is a resident of territory occupied by an adverse Party and who, on behalf of the Party on which he depends, gathers or attempts to gather information of military value within that territory shall not be considered as engaging in espionage unless he does so through an act of false pretense or deliberately in a clandestine manner. Moreover, such a resident shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured engaging in espionage.

4. A member of the armed forces of a Party to the conflict who is not a resident of territory occupied by an adverse Party who has engaged in espionage in that territory shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured before he has rejoined the armed forces to which he belongs.

*Id.* Under the Geneva Convention III, the status of a prisoner of war was expanded to include better-defined conditions of captivity, resources and relief that prisoners of war receive, defined due process rights, and the concept of their speedy release when active hostilities are stopped. Geneva Convention III Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter “Geneva Convention III”]

91. Protocol I, *supra* note 89.

implications of espionage during times when a State is not at war, or with respect to persons who are not members of armed forces.

When analyzing espionage in times of peace, there are three views that international scholars embrace. First, espionage is permissible under international law because it can be considered self-defense and it is not against the principle of *jus cogens*.<sup>92</sup> Second, espionage is prohibited under international law because it “violates a duty that states have under international law to respect the territorial integrity and political independence of other states.”<sup>93</sup> Third, espionage is neither legal nor illegal under international law.<sup>94</sup> While there are compelling arguments supporting each of the three theories, there is no consensus as to which theory should prevail. nation states are not willing to give up habits of spying on friends and foes alike,<sup>95</sup> nor are they willing to publicly condone spying out of fear that doing so will provide justification for other states to spy on them. Further, international law is widely accepted as being permissive, meaning that if something is not expressly prohibited, it is not forbidden.<sup>96</sup> Thus, espionage law is not sufficiently developed to clearly exclude the detention of journalists when publishing political speech.

#### **B. International Laws Regarding Journalists**

Areas of law regarding journalists exist, though they do not specifically safeguard journalists against politically motivated claims of espionage.

The first set of laws to protect journalists were enacted in the Lieber Code (“the Code”), adopted during the American Civil War. Article 50 of the Code holds that “citizens who accompany an army for whatever purpose, such as sutlers, editors, or reporters of journals, or contractors, if captured, may be made prisoners of war, and be detained as such.”<sup>97</sup> The

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92. Radsan, *supra* note 88, at 623.

93. Cmdr. Roger D. Scott, *Territorially Intrusive Intelligence Collection and International Law*, 46 A.F. L. REV. 217, 218 (1999).

94. Radsan, *supra* note 88, at 623.

95. In 2013 Edward Snowden gave thousands of classified documents from the NSA to journalists who later published them. The documents included evidence of America spying on Germany and other allies. While America is far from being the only country that participates in this type of behavior, it is one example of a country spying on friends. Shira Ovide, ‘I Already Won,’ Says NSA Leaker Edward Snowden, WASH. POST (Dec. 23, 2013, 10:26 PM), <http://blogs.wsj.com/digits/2013/12/23/i-already-won-says-nsa-leaker-edward-snowden/>; Anton Troianovski, *Germany Warns U.S. About Spying on Its Officials*, WALL ST. J. (July 2, 2015, 9:35 PM), <http://www.wsj.com/articles/germany-requests-meeting-with-u-s-ambassador-over-new-spying-leaks-1435850048>.

96. See generally Michael Jefferson Adams, *Jus Extra Bellum: Reconstructing the Ordinary, Realistic Conditions of Peace*, 5 HARV. NAT’L SEC. J. 377 (2014).

97. General Orders No. 100: Instructions for the Government of Armies of the United States in the Field art. 50, (Apr. 24, 1863).

Lieber Code became the basis for much of the law of armed conflict and the foundation for rights given to journalists.

Following the Lieber Code, the First Hague Peace Conference of 1899 included Article 13 which provided that “[i]ndividuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters . . . have a right to be treated as prisoners of war, provided they can produce a certificate from the military authorities of the army they were accompanying.”<sup>98</sup> This idea was also echoed in Article 13 of the 1907 Hague Regulations<sup>99</sup> and Article 81 of the 1929 Geneva Convention.<sup>100</sup>

After World War II, the Geneva Convention III expanded the protection in Article 4(A):

Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy . . . . Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.<sup>101</sup>

This article affirms that journalists who are accompanying the military (i.e., embedded journalists<sup>102</sup>) are given the protection of a prisoner of war if they are captured.<sup>103</sup> The protection of a prisoner of war is only given to journalists who accompany the military, not to journalists who are in an area of conflict on their own volition. The difference is significant because the many journalists who are working in areas of armed conflict are not

98. Hague Convention (II) Regarding the Laws and Customs of War on Land, July 29, 1899, 187 C.T.S. 429.

99. International Convention Respecting the Law and Customs of War on Land art. 13, Oct. 18, 1907, 205 Stat. 277.

100. Geneva Convention Relative to the Treatment of Prisoners of War art. 81, July 27, 1929, 75 U.N.T.S. 135, 118 L.N.T.S. 343.

101. Geneva Convention III, *supra* note 90, art. 4(A).

102. “[H]umanitarian law distinguishes between two categories of journalists working in conflict zones: war correspondents accredited to the armed forces and ‘independent’ journalists . . . .” Alexandre Balguygallois, *Protection des journalistes et des médias en période de conflit armé*, 86 IRRC 37 (Mar. 2004) (Fr.), translated in *Protection of Journalists and Media Professionals in Time of Armed Conflict*, INT’L COMM. OF THE RED CROSS (Jan. 23, 2012), <https://www.icrc.org/casebook/doc/case-study/protection-journalists-case-study.htm>.

103. Protocol I, *supra* note 89, art. 46.

accompanying the military; they are on their own or with a private organization.

In 1977, the Diplomatic Conference held in Geneva determined that journalists, embedded or not, are also considered “civilians” and enjoy the status and protection that any civilian enjoys.<sup>104</sup> Article 75 of Protocol I explains that “persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions . . . shall be treated humanely in all circumstances.”<sup>105</sup> Thus, journalists are “protected both against the effects of hostilities and against arbitrary measures taken by a party to the conflict when they fall into that party’s hands, either by being captured or being arrested.”<sup>106</sup>

Consequently, the current laws allow for journalists to be given prisoner of war status when embedded within the military and the protection that civilians normally hold in other situations. While these two categories of law may provide some protection for journalists in armed conflict, they do not offer any protection in cases where a journalist is detained on politically motivated claims of espionage.<sup>107</sup> As demonstrated above, the lack of developed law leaves little security for journalists and is inconsistent with a journalist’s role in providing needed transparency of governments and governmental officials. Thus, in order to preserve the rule of law regarding transparency, stronger international laws must provide greater security and protection for journalists.

## V. Proposed International Standard

Although a nation state’s ability to protect itself from national security risks is an inherent right, there must be an international standard to protect journalists who uphold the rule of law—even in times of “national emergencies.” When freedom of speech is particularly vulnerable, a government or regime might ignore existing rules of law, undertake to detain, silence, or censor the reporting and dissemination of information that is contrary to or criticizes the political views of those in power. During such periods it is especially paramount for journalists to gather information, expose possible corruption, and ensure that governments, public figures,

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104. *Id.* art. 79.

105. *Id.* art. 75(1).

106. Balguygallois, *supra* note 102.

107. In times of peace the laws that protect journalists include state’s domestic laws and human rights laws. As discussed earlier, the human rights laws that protect journalists include the freedom of speech and the media. The domestic laws referenced above apply to individual nation states so there is no uniformity in the laws. Some states have vigorous laws protecting journalists (Scandinavian countries), and some states have relatively little law to protect journalists. ICCPR, *supra* note 37, at 19.

and their challengers are transparent and accountable. However, in these instances, journalists are sometimes subjected to illegitimate and specious accusations of espionage. Thus, a higher international standard is needed to protect the political expression of journalists.

Undoubtedly there will be instances in which the rule of law or even an international standard will be ignored, but an unequivocal standard should exist to which appeal can be made and arguments fashioned to defend journalists who might be detained, arrested, or imprisoned. The proposed international standard set forth below would be beneficial in several important ways. First, beyond a binding international standard, it would stand as a model of a rule of law that could be adopted as domestic law by nations states who are, or could be convinced, that such additional protections are necessary. Second, such a standard would provide a guideline and argument to use in proceedings to attempt to free journalists who are illegitimately charged and detained by governments and leaders who avoid transparency or oppose the dissemination of information about possible corruption, atrocities, or alternative viewpoints.

Several paragraphs in the ICCPR address the subject matter at hand and could be amended to provide better protection to the journalistic right of political expression. Specifically, Article 19 should be expanded to provide model language for protection, and Article 4 should be expanded to restrict the ability of a nation state to derogate from the right that a journalist has to participate in political expression. It is therefore proposed that the ICCPR be amended to classify Article 19 as a nonderogable, core right when applied to journalists who are participating in political expression.

Article 19 of the ICCPR should be amended to include a new paragraph 4. The amendment would read:

With respect to journalists, governments or nation states shall not apply false or pretextual restrictions of national security to restrict a journalist's rights to:

- a. Exercise the freedom of political expression, including the right to seek, receive, and impart information of any and all kinds, either orally, in writing or print, in the form of art, or through any other media of his choice.
- b. Report and impart to any person, agency or entity information dealing with matters of government, public officials (including their political motives and actions), laws, legislation, living conditions, acts of police, military, courts, prison systems, and the enforcement of laws—with the narrow exception of information that is deemed “classified.”

The first sentence of the new paragraph 4 expands Article 19 to restrict a state's use of false, illegitimate, pretextual, or self-protective claims of natural security to restrict a journalist's right to freedom of speech and freedom of the media. It is purposefully broad in order to encompass and suggest a comprehensive prohibition against restrictive measures against journalists. Subsequently, the language of subdivision (a) incorporates the precise language of existing paragraph 2. This language is adequately broad and leaves no doubt that political expression is included in the amendment.

The language of subdivision (b) further expands the protections that Article 19 provides to journalists. It specifically broadens the right of a journalist to comment on the activities and motives of government officials in order to avoid the limitations of language of the existing paragraph 3. This amendment is necessary because journalists will rely on this standard when they are performing their duty to gather and disseminate information, alert the world of corruption, and maintain government transparency and accountability. This portion of the amendment allows the press to serve society rather than the government and to safely share their divergent opinions from the government. The amendment supports journalists as they utilize the freedom of speech so that they are able to ensure transparency.

The issue now becomes how nation states will define political expression. Political expression and political speech is generally defined as "speech that deals with matters of government, public officials, legislation, and so forth."<sup>108</sup> It can include "suggestions to change the law, proposals for new policies, or criticisms of public official."<sup>109</sup> While this definition is correct, it is overly broad when applied to the absolute protection granted to journalists in the proposed amendment to Article 19. Journalists need a higher level of protection when they are participating in political speech because they fulfill a crucial role by providing transparency and holding governments accountable for their actions. However, to grant this absolute protection, the definition of expression must be narrowed to prevent abuse. If journalists use the duty and right of freedom of speech to incite violence, propagate hate, encourage illegal acts, or disseminate lies, they are not acting within the scope of the proposed protection.

Political expression should not include inciting violence or propagating human right violations. During the Nuremberg Trials, Julius Streicher, a journalist and author, was found guilty of "incitement to murder and

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108. Harel, *supra* note 14, at 1896.

109. *Id.*

extermination” when he used his newspaper as a tool for anti-semitic rhetoric.<sup>110</sup> Part of Streicher’s judgment read:

[T]wenty-five years of speaking, writing, and preaching hatred of the Jews, Streicher was widely known as “Jew-Baiter Number One.” In his speeches and articles, week after week, month after month, he infected the German mind with the virus of anti-Semitism and incited the German People to active persecution. Each issue of *Der Stürmer* which reached a circulation of 600,000 in 1935, was filled with such articles, often lewd and disgusting.<sup>111</sup>

Examples of Streicher’s hateful propaganda include a picture of a Nazi pumping gas into a tree surrounded by dead rats with the captions: “When the vermin are dead, the German oak will flourish once more” and “[t]he enemy of the German people, the Jew is wading through an ocean of blood toward world domination. He will have to die.”<sup>112</sup>

Similarly, during the International Criminal Tribunal for Rwanda, four journalists were convicted for campaigning for the ethnic cleansing of the Tutsis.<sup>113</sup> In the judgment against the journalists, the International Criminal Tribunal for Rwanda wrote:

The newspaper and the radio explicitly and repeatedly, in fact relentlessly, targeted the Tutsi population for destruction. Demonizing the Tutsi as having inherently evil qualities, equating the ethnic group with “the enemy” and portraying its women as seductive enemy agents, the media called for the extermination of the Tutsi ethnic group as a response to the political threat that they associated with Tutsi ethnicity.<sup>114</sup>

110. The Nuremberg Trial of 1946, 6 F.R.D. 69, 162 (1946).

111. *Id.* at 163.

112. *Caricatures from Der Stürmer: 1927-1932*, GERMAN PROPAGANDA ARCHIVE, <http://research.calvin.edu/german-propaganda-archive/sturm28.htm> (last visited Mar. 30, 2016); *Julius Streicher Speaks to a Mass Meeting in Nuremberg*, GERMAN PROPAGANDA ARCHIVE (Oct. 31, 1939), <http://research.calvin.edu/german-propaganda-archive/streicher3.htm>.

113. Robbie Corey-Boulet, *Kenyan Trial Asks, Can Journalism Be a War Crime?*, THE ATLANTIC (May 16, 2011), <http://www.theatlantic.com/international/archive/2011/05/kenyan-trial-asks-can-journalism-be-a-war-crime/238692/>.

114. Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Judgment and Sentence, ¶ 320 (Int’l Crim. Trib. for Rwanda Dec. 3, 2003), <http://unictr.unmict.org/sites/unictr.org/files/case-documents/ict-99-52/trial-judgements/en/031203.pdf>.

The above examples illustrate situations when a journalist's speech does not fall into the category of "political expression." Journalistic political expression is substantiated when a journalist is properly informing the world of what she sees and providing transparency. Thus, any journalists who use their duty to provide transparency of the government as a way of inciting terrorism or any imminent unlawful action should not fall under this exception.

Since governments will likely be the entity that determines whether a journalist's speech is "political speech" or speech that incites violence, there should be a presumption that a journalist is acting properly. There are various ways that a government can rebut this presumption and make the determination as to whether the manifestations of a journalist fall under the umbrella of political expression. When determining whether the speech incites violence, the United Kingdom has determined that it is necessary to look at the "overall context in which the statements or publications are made or distributed, including how they are likely to be understood, both by the general public and the intended recipients."<sup>115</sup> Alternatively, the United States has determined that it is a requirement to "prove both an intent to incite or produce unlawful action and the likelihood that the speech will actually incite imminent unlawful action."<sup>116</sup> Accordingly, for a government to rebut the presumption that a journalist's speech is not appropriate political speech, and therefore unprotected, the government would have to prove that the individual was intentionally trying to incite an unlawful action and that the speech would actually be likely to entice that action.<sup>117</sup>

Next, the proposed subdivision (b) of paragraph 4 of Article 19 creates a narrow exception for the protection of "classified information." It is clear that a State has the right to govern and protect itself, and keeping privileged information classified helps nation states fulfill those objectives. However, a State could easily use this narrow exception as a loop hole to make false accusations regarding national security, which would severely limit the effectiveness of the proposed amendments to both Article 19 and Article 4. It is beyond the scope of this paper to create an international definition of

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115. *The Use of the Internet for Terrorist Purposes*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, 39 ¶ 118. See, e.g., *Brogan v. United Kingdom*, App. No. 11209/84, 11 Eur. H.R. Rep. 117, ¶ 61.3 (1988).

116. UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 115, 39 ¶ 119.

117. Intentionally inciting an unlawful action would be an example of the type of speech that could be prohibited but there could be other types and situations that would provide an adequate basis for a state to censor a journalist (i.e., a journalists publishing classified information that contained military secrets and objectives).

“classified information,” though it should be addressed as a potential concern.

Beyond the addition to Article 19, Article 4 of the ICCPR should be expanded to make Article 19.4 a nonderogable right. After the expansion (shown in bold below), the addition in Article 4 would read:

No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16, 18 **and 19 (paragraph 4)** may be made under this provision.<sup>118</sup>

The ICCPR may adequately defend the right of individuals to hold opinions, freedom of expression, freedom of dissemination, freedom of media, and freedom of speech. However, this protection will not be sufficient—regardless of how well-written or broad Article 19 is—if a state is able to derogate from that obligation. It does not matter how temporary or proportional the derogation is; a state cannot successfully abide by the rule of law on transparency if they are able to infringe on a journalist’s freedom of speech. Therefore, Article 4, paragraph 2, should include language that prohibits derogation of the rights granted for journalists participating in political speech in proposed paragraph 4 of Article 19.

Thus, if the ICCPR declares that national security cannot be used as a false pretext for derogation from Article 19, and an exception for journalists participating in political speech is added for when states can legally derogate from Article 19, journalists will enjoy stronger protection. These two proposed changes will more effectively guard journalists from politically-motivated claims of espionage, which will lead to greater transparency and the rule of law will be upheld.

#### IV. Conclusion

When Anna Politkovskaya unforgettably expressed, “I am exhausted. I have seen too much. I don’t want to go back to Chechnya, but if I don’t who will?”<sup>119</sup> she stood as an example of the best of what journalists have to offer. She fought tirelessly for the rule of law through transparency to be upheld in both Chechnya and Russia. As a consequence of her dedication, she died as a martyr for her cause. Journalists are truly the watchdogs of society. There are countless examples of journalists who have sacrificed their freedom, health, safety, and even their lives so that they can accomplish the goals of gathering and disseminating what is going on in

118. ICCPR, *supra* note 37, art. 4.

119. U.N. SCOR, 77th Sess., 7450th mtg., *supra* note 4, at 7.\*

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the world, of informing the public, and keeping governments and public figures accountable and transparent.

When democracy is threatened, freedom is endangered, and liberty is vulnerable, the press is the first—and at times can be the last—line of defense before governments cross the line of corruption and promulgate acts against human rights. Because journalists play such an important role for society, international laws need to be changed. Current law may allow restriction of freedom of speech during times of public emergency, but it ought never be justified to restrict the freedom of speech for journalists engaged in political expression. By making the right granted in Article 19 a non-derogable human right for journalists, the rule of law regarding transparency will be upheld, and politically-motivated claims of espionage will be deterred.